No. 85-589

(2)

Supreme Court, U.S.
FILED
NOV 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

October Term, 1985

GUS HALL, *et al.*,

*Petitioners*

v.

EDWIN J. SIMCOX, *et al.*,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Central Publishing Company, Inc., Indianapolis, IN 46206

9 pp

## QUESTION PRESENTED

Whether the State of Indiana may raise the number of signatures required on petitions to gain ballot access for a party from one-half percent (1/2%) to two percent (2%) of the total vote cast for Secretary of State at the last preceding general election wherein that office was contested.

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## REASON WHY THE WRIT SHOULD NOT ISSUE:

## THIS CASE DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION

### I.

### THE INDIANA STATUTE IS CLEARLY CONSTITUTIONAL

Indiana's petition requirement of two percent (2%) of the total vote cast in the most recent preceding election for

Secretary of State is far less onerous than petition requirements which have been approved by other courts, including the United States Supreme Court: Five percent in *Jenness v. Fortson*, 403 U.S. 431 (1971); five percent in *Storer v. Brown*, 415 U.S. 724 (1974); five percent in *Arutonoff v. Oklahoma State Election Board*, 687 F.2d 1375 (10th Cir. 1982); three percent in *Libertarian Party v. Florida*, 710 F.2d 790 (11th Cir. 1983). Indiana's two percent requirement has been upheld in a separate case, *Populist Party v. Orr*, 595 F.Supp. 760 (S.D. Ind. 1984).

Moreover, if one considers the observation in *Storer v. Brown, supra*, 415 U.S. at 730, quoted by Petitioners on pp. 6-7 of their brief, that there is no "litmus-paper test" for separating valid from invidious restrictions, it is clear that Indiana's requirement is even *less* restrictive, relative to the higher limits approved in other cases, than the mere difference in percentage shows. The base to which the percentage is applied is not all registered voters, but actual voters in a particular election. The base is not the vote for President or Governor, but for Secretary of State, as the Court of Appeals noted, "a more obscure officer chosen in an off-year election." Appendix to Petitioner's Brief, page A-4. Moreover, Indiana does not impose onerous geographical restrictions on petitions, nor does it charge a fee for validating the petitions, nor does it require that petitions be collected within a short period of time or long before the election. Indeed, and again as noted by the Court of Appeals, Appendix to Petitioner's Brief, page A-9, Indiana requires only that "signers be registered voters and that their signatures be attested." Thus Indiana's two percent requirement is not only *lower* than requirements in other states which have met with judicial approval, but also exists in conjunction with a complete lack of crippling requirements that existed in some other states.

The fact that Indiana's statute replaced a more lenient provision is irrelevant. "The ultimate test is whether the particular election laws under attack, when considered in

connection with other related election laws, unduly encourage maintenance of the political status quo or are oppressive to a degree that stifles the exercise of first amendment rights." *Arutonoff, supra*, at 687 F.2d 1380. Viewed in the light of harsher requirements in other states which have been upheld by the federal courts, including the United States Supreme Court, Indiana's statute is clearly constitutional.

## II.

## THE COURT OF APPEALS APPLIED THE CORRECT STANDARD IN UPHOLDING THE INDIANA STATUTE

The Court of Appeals rejected a "strict scrutiny" test for ballot access laws and instead adopted a standard under which "reasonable, nondiscriminatory restrictions" are sustained, citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Appendix to Petitioners' Brief, pp. A-3 — A-6. Petitioners, in their Brief at pp. 8-9, cite *Socialist Workers Party v. Secretary of State of Washington*, 765 F.2d 1417 (9th Cir. 1985) and *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985), urging that those cases used a "strict scrutiny" test — "compelling state interest" — and that there is thus a conflict in the circuits over the appropriate test to be used in evaluating ballot access laws. This is incorrect.

Both *Socialist Workers Party* and *Bergland* concluded that such statutes should be analyzed in the fashion of *Anderson v. Celebrezze, supra*, by weighing the character and magnitude of asserted injury against the interests advanced by the State. *Bergland*, 767 F.2d at 1553; *Socialist Workers Party*, 765 F.2d at 1420. However, the Fifth Circuit's analysis of *Anderson, supra*, makes clear that *Anderson* does *not* impose a strict scrutiny test. *Dart v. Brown*, 717 F.2d 1491, 1503 (5th Cir. 1983). Thus use of an *Anderson* analysis does not conflict with the approach of the Seventh Circuit in the instant case.

Petitioners themselves note that this is "the first case in which the federal courts have reviewed an increase in the signature requirement as opposed to an existing requirement." Brief of Petitioners, page 11, fn. 4. They also urge that the question "is likely to arise in other states." Brief of Petitioner, p. 9. If this is the first case, there obviously can be no conflict necessitating review by this Court on certiorari. The better course would be to permit the various circuits to analyze this question as and when it arises. The Petition for Writ of Certiorari should be denied.

## CONCLUSION

For the foregoing reasons, Respondents respectfully urge that the writ of certiorari be denied.

Respectfully submitted,

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